network only on an unbundled (as opposed to a combined) basis. In other words, argues BAVT, § 251(c)(3) does not permit a new entrant to purchase assembled platforms of combined network elements (or a lesser combination of elements) in order to offer competitive telecommunications services.[15] According to BAVT, to permit this and to require access to already-combined network elements at cost-based rates for unbundled access would destroy the careful distinctions which Congress established in §§ 252(c)(3) and (4) between unbundled elements on the one hand and the purchase, for resale purposes, of an incumbent's entire retail services on the other hand.[16]

BAVT also argues that the Eighth Circuit vacated the FCC requirement that incumbent LECs offer combined network elements to other providers "not because the authority to impose that requirement was reserved to the States, but rather because [the rules] could not be 'squared with,' and were 'contrary to,' the Telecommunications Act of 1996."[17] Under the Supremacy Clause of the U.S. Constitution and the doctrine of preemption, argues BAVT, the Eighth Circuit's interpretation of the Act is equally applicable to the States. Consequently, asserts BAVT, the Board cannot impose a like condition upon the Company in Vermont.[18]

I do not agree. The Board is not preempted by the Act from taking action in this respect. The Eighth Circuit's decision went to the validity of FCC rules and the nature of FCC authority under the Act. To the extent that the Court considered State authority at all, it observed that States retain independent power to develop interconnection and access requirements.[19] The Act recognizes that role of the States; § 251(d)(3) expressly provides:

> (3) PRESERVATION OF STATE ACCESS REGULATIONS – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order or policy of a State commission that –
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) *is consistent* with the requirements of this section; and

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15. Hence the term, UNE-P, or "unbundled network element platform."
16. BAVT 1/23/98 at 2, 7-9.
17. *Id.* at 1-2.
18. *Id.*
19. Rehearing Order at 806.

> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[20]

In addition, §§ 261(b)-(c) of the Act state:

> (b) EXISTING STATE REGULATIONS – Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, *if such regulations are not inconsistent with* the provisions of this part.
>
> (c) ADDITIONAL STATE REQUIREMENTS – Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are *not inconsistent with* this part or the Commission regulations to implement this part.[21]

These sections establish Congressional intent not to preempt access and interconnection requirements adopted and enforced by States, unless the state requirements are inconsistent with the Act.

The Supremacy Clause (Art. VI, cl. 2) of the United States Constitution provides the federal government with the power to preempt state law.[22] To determine whether a state statute or regulation is preempted by federal law, the fundamental inquiry is whether Congress intended to preempt the state.[23] This inquiry "... starts with the basic assumption that Congress did not intend to displace state law."[24] This presumption against preemption is especially strong when Congress has legislated in an area historically subject to regulation by the states: "we 'start with the assumption that the historic police powers of the States were not

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20. Emphasis added.

21. Emphasis added.

22. Assuming, of course, that Congress is acting within the scope of its legitimate authority. No party in the current proceeding has suggested that regulation of telephone rates is outside the scope of Congressional authority.

23. *E.g., Medtronic, Inc. v. Lohr*, 64 U.S.L.W. 4625, 4629 (1996); *Schneidewind v. ANR Pipeline Co. and ANR Storage Co.*, 108 S.Ct. 1145, 1150 (1988).

24. *Maryland v Louisiana*, 451 U.S. 725, 746 (1981); *see also Medtronic*, 64 U.S.L.W. at 4629; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 at 479-480 (2d ed. 1988).

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[25]

Courts customarily treat preemption as falling into one of three general categories – express preemption, implied preemption, and conflict preemption – although, as Professor Tribe notes, the categories "are *anything* but analytically air-tight."[26] The first category, express preemption, exists when Congress expressly states its intention to preclude state action.[27] Implied preemption is found when the structure or objectives of federal law demonstrate that Congress intended to preclude state law.[28] Conflict preemption results when state law actually conflicts with federal law, either due to the physical impossibility of complying with both laws or to a state regulation obstructing the accomplishment of the full objectives of Congress.[29]

In recent decisions, the United States Supreme Court has somewhat truncated this traditional three-part preemption analysis. Specifically, the Court has noted that:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.[30]

When Congress so includes an express preemption provision in its legislation, a court must of course construe that statutory language to determine the scope of that preemption.[31] This exercise in statutory construction must be informed both by the ultimate goal of ascertaining Congressional intent and by the presumption against preemption, a presumption

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25. *Medtronic*, 64 U.S.L.W. at 4629 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2618 (1992).
26. L. TRIBE, *supra*, § 6-25 at 481 n.14; *Schneidewind*, 108 S.Ct at 1150.
27. *Id.*; L. TRIBE, *supra*, § 6-25 at 481 n.14.
28. *Schneidewind*, 108 S.Ct. at 1150; L. TRIBE, *supra*, § 6-25 at 481 n.14.
29. *Schneidewind*, 108 S.Ct. at 1150-1151; L. TRIBE, *supra*, § 6-25 at 481 n.14.
30. *Cipollone*, 112 S.Ct. at 2618 (citations omitted); *see also Medtronic*, 64 U.S.L.W. at 4629.
31. *Medtronic*, 64 U.S.L.W. at 4629.

that (as noted above) is particularly powerful when Congress has legislated in an area historically subject to regulation by the state.[32]

In considering the overall scope of preemption implied by the subsections of §§ 251 and 261 quoted above, we must bear in mind that State access and interconnection policies need only be "consistent with" the Act.[33] Those express provisions convey in unambiguous terms the Congressional intent not to broadly preempt state action. Instead, those provisions demonstrate that states have primary jurisdiction over interconnection and access, and are preempted only from imposing requirements that are inconsistent with relevant provisions of the Act and FCC regulations. This conclusion is in keeping with the Supreme Court's command in *Cipollone* that ". . . we must construe these provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of [the statutory preemption provision]."[34] This is also in keeping with the conclusion that "consistent with" does not require that States implement regulatory policies that are identical to those that will prevail at the Federal level.[35]

Finally, I note that BAVT's reading of the Eighth Circuit's interpretation of § 251(c)(3), taken to its logical extreme, would lead one to conclude that the Act contains an outright prohibition against UNE combination. There is no support for this conclusion, either in the Eighth Circuit Decision or in the Act itself. Nowhere in either is there a suggestion that LECs or CLECs may not voluntarily agree to combine UNEs or that such a practice is unlawful. The Eighth Circuit Decision merely states that the FCC cannot require such a practice.[36] At this time I do not reach the issue of whether it would be appropriate under Vermont law to require BAVT to combine UNEs, but I do conclude that such a decision may be consistent with the

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32. *Id.* at 4629-4630.

33. Since Congress included in the federal statute provisions that explicitly address the preemption of state authority, the scope of preemption is determined by the terms of those express provisions, with this determination measured against the touchstone of Congressional intent and informed by the strong presumption against preemption in this field historically subject to regulation by the states. *Medtronic*, 64 U.S.L.W. at 4629; *Cipollone*, 112 S.Ct. at 2618.

34. *Cipollone*, 112 S.Ct. at 2618.

35. See *Environmental Defense Fund, Inc. v. E.P.A.*, 82 F.3d 451 (D.C. Cir. 1996)("consistent with" does not require exact correspondence, but only congruity or compatibility). Note also that, in the Rehearing Order (at 806-807), the Eighth Circuit reaches the same conclusion.

36. Rehearing Order at 813.

purpose of the Act to promote competition in the market for local exchange service. For all these reasons, I conclude that neither the Act nor the Eighth Circuit's decision precludes the Board from considering whether it is appropriate for BAVT to make available combined network elements for requesting CLECs.

III. ISSUE PRECLUSION

BAVT also argues that AT&T and the DPS are precluded under the doctrine of collateral estoppel (issue preclusion) from raising UNE-platform issues in this docket.[37] Specifically, BAVT argues that "[h]aving litigated and lost the issue of combined network elements before the Eighth Circuit, the doctrine of issue preclusion mandates that the [CLECs] not be permitted to relitigate the same issue before the Board."[38] For the reasons that follow, I conclude that the parties are not barred from raising the question of the Board's authority to consider UNE combination.

Before precluding relitigation of an issue, a court must "examine the first action and the treatment the issue received in it."[39] Also, as proponent, BAVT has the burden of establishing that the prior litigation bars the parties from raising, and therefore the Board from considering, whether the Board has authority over the provisioning of UNE combinations.[40] The Vermont Supreme Court held, in *Trepanier v. Getting Organized, Inc.*, that the application of "issue preclusion" involves a determination of five factors.[41] For the purposes of this analysis, I will focus first upon the third factor set out in *Trepanier* – that is, is the issue the same as the one previously litigated? – before looking at the other elements. Absent a demonstration that there is an identity of issues between the question of Board authority being raised in this docket and the issues raised in the Eighth Circuit case, collateral estoppel cannot bar consideration of the Board's authority.

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37. BAVT 1/23/98 at 15, citing *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) and Rehearing Order.

38. *Id.*

39. *State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme Court, Dec. 5, 1997).

40. *Ianelli v. Standish*, 156 Vt. 386, 388 (1991).

41. *Trepanier v. Getting Organized, Inc.*, 155 Vt. at 265 (1990); *State v. Stearns*, 159 Vt. 266, 268, 617 A.2d 140, 141 (1992).

In their arguments on preemption (already discussed), the parties confront the question of whether the issue raised in this docket is the same as that which was taken up in the earlier action. AT&T and the Department contend that the Eighth Circuit ruled on whether the FCC was justified in developing its unbundling regulations. They also argue that the Court never considered the state role in the unbundling process. Finally, they contend that, had that question been considered, the Court's discourse on the point would have been *dicta* only and, as such, inessential to its holding. BAVT, on the other hand, argues that the Eighth Circuit Decision was not jurisdictional but, rather, dispositive on the substance of the issue, when it concluded that mandating UNE combinations is inconsistent with § 251(c)(3) of the Act.

In its Rehearing Order, the Eighth Circuit ruled on two issues that are relevant to the question before the Board now: one, the FCC's authority with respect to unbundling generally and, two, its specific proposal for network element unbundling practices.[42] The Eighth Circuit expressly characterizes its inquiry as the review of a final order issued by the FCC pursuant to federal statute.[43] In the current docket, it is the Board's authority, and not the FCC's, that is at issue.[44] Here the Board must consider whether the Act according to the Eighth Circuit Decision preempts it, acting under state authority, from considering UNE combination. Accordingly, the issue is not the same as that addressed by the Eighth Circuit and collateral estoppel does not apply.[45]

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42. Other state commissions agree with this characterization of the Eighth Circuit's Rehearing Order. See, *e.g., In the matter of the petition of BRE Communications, L.L.C. for arbitration of interconnection terms, conditions, and prices from GTE North Incorporated and Contel of the South, Inc., d/b/a GTE Systems of Michigan*, Michigan Public Service Commission Case No. U-11551, Order of 1/28/98, at 4-6.

43. Rehearing Order at 792.

44. It is common for a federal agency and similar state agencies to concurrently consider related issues, *e.g.*, the current FCC Notice of Proposed Rulemaking on measurement and performance of Operational Support Systems (OSS) and numerous states' proceedings on OSS costs and cost allocations.

45. Absent a showing that the issues are the same, there is little sense in providing an extended discussion of the other *Trepanier* elements. However, to be thorough, I quickly consider each of the remaining elements: (1) *Preclusion must be asserted against one who was a party or in privity with a party in the earlier action.* This case involves many of the same parties as those that participated in the Eighth Circuit case, including AT&T, MCI, Sprint, and Bell Atlantic; however, the Department was not a party. Thus, element one is not met. (2) *The issue was resolved by a final judgment on the merits.* Related to this factor is the precept that preclusion applies only to an issue which was necessary and essential to the resolution of the prior case. See, *e.g., State v. Pollander*, No. 96-387 Slip Op. at 3 (Vt. Supreme court, Dec. 5, 1997); *Berisha v. Hardy*, 144 Vt. 136, 138, 474 A2d. 90, 91 (1984); *Longwiello v. Windham Southwest*

(continued...)

IV. BOARD AUTHORITY UNDER STATE LAW

There is no dispute among the parties that, if the Board is not preempted by the Act or precluded by federal case law from ordering UNE combinations, existing state statutes and precedents accord the Board sufficient authority to do so. AT&T cites 30 V.S.A. § 209(a)(3) and the Board's February 21, 1986, Order in Docket 4946 in support of its argument.[46] The DPS relies primarily on the Board's May 29, 1996, Order in Phase I of this docket when it asserts that the Board currently has authority to require UNE combinations, and it also suggests that Vermont's general policies in favor of the competitive delivery of telecommunications services, as set out in 30 V.S.A. §§ 202c(b)(2), 226b(b)(9), and 227a, further support its position.[47] In contrast, Bell Atlantic does not even reach the question, instead arguing only that the Board is preempted by the Act and the Eighth Circuit's decision.[48]

I conclude that existing Vermont statutes and case law provide the Board sufficient authority to consider the questions surrounding UNE combinations. The analysis of the Board's legal authority "to implement rules and procedures for the competitive delivery of local exchange services" that was performed in Phase I of this docket lays this question to rest. I refer the parties to that discussion; there is no need to repeat it here.[49]

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45. (...continued)
Supervisory Union, No. 95-275 Slip Op. (Vt. Supreme Court, May 31, 1996); *In Re Application of Carrier*, 155 Vt. 152, 157 (1990). No party has argued that the Rehearing Order was not a final judgment; however, because the issue of the Board's authority was not addressed, this element is not met. (4) *There was a full and fair opportunity to litigate the issue in the earlier action.* I am not persuaded that there was a full and fair opportunity to litigate this matter in the prior proceeding. For the reasons articulated under the third *Trepanier* element above, the same issue was not addressed and, therefore, there was no opportunity to litigate the Board's authority in this context. (5) *Applying collateral estoppel in the subsequent action must be fair.* I am not persuaded that application of collateral estoppel in this proceeding would be fair, inasmuch as the Board's authority to consider this issue has never been raised until now.

46. AT&T 1/23/98 at 25-28.

47. DPS 1/23/98 at 16-18. Here the DPS's logic presumes that the availability of UNE combinations will promote competition and thus the general good. At this time, that is an assumption merely, as yet untested in the hearing room.

48. BAVT 1/23/98 at 11, fn. 26. The Company states merely that "Presumably, the state authority to mandate [UNE combinations] would be 30 V.S.A. §§ 203 and 209...."

49. Phase I Order at 8-14. Let me state clearly that this conclusion is not the same as finding that, as the DPS argues, mandating UNE combinations would promote competition. DPS, 1/23/98, at 16. Simply, in the context of determining what policies (competitive or otherwise) will promote the public good, the Board (continued...)

V. CONCLUSION

For the foregoing reasons, I conclude that the Board is not preempted by federal law or precluded by the Eighth Circuit's Rehearing Order from examining whether incumbent LECs should be required to offer combined UNEs to competitive providers. In addition, I conclude that, under current state law, the Board has the authority to do so.[50]

It is therefore necessary to address the factual and policy issues related to UNE combinations. Should evidence and testimony on the issue be presented? If so, should the question be taken up in this phase of the docket or in a later one, or in another docket altogether? I direct the parties to file, with their comments on this proposal for decision, recommendations for how to proceed in this matter.

This proposal for decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

DATED at Montpelier, Vermont, this _____ day of _____, 1998.

Frederick W. Weston, III
Hearing Officer

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49. (...continued)
is entirely within its authority when it considers whether the availability of UNE combinations will serve that end.

50. These conclusions are consistent with those reached in the recent proposal for decision issued on March 27, 1998, in this docket (Phase II, Module One). In considering whether the Eighth Circuit's ruling with respect to the FCC's "pick and choose" rule preempts the Board from adopting its own pick and choose requirement, I concluded that "it is difficult to see how the FCC's pick and choose rule, and the Eighth Circuit's overturning of it, can be construed as preemptive of state action. I agree with the Department that the Board is well within its authority to consider the question." Phase II, Module One, proposal for decision, 3/27/98, at 35, referring to *Iowa Utilities Board v. FCC*, No. 96-3321, 1997 WL 403401 (July 18, 1997).

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The conclusions and recommendations of the Hearing Officer are adopted.

2. The Hearing Officer shall set a procedural schedule, hear evidence, and issue a recommended decision for resolving the factual and policy issues relating to the provision by incumbent local exchange companies of combinations of unbundled network elements.

Dated at Montpelier, Vermont, this _____ day of _____, 1998.

_____)
) PUBLIC SERVICE
_____) BOARD
) OF VERMONT
_____)

OFFICE OF THE CLERK

Filed:

Attest: _____
Clerk of the Board

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.

Document Name: UT-960307 -- Commission Order Partially Granting Reconsideration

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration)
of an Interconnection Agreement Between) DOCKET NO. UT-960307
)
AT&T COMMUNICATIONS OF THE PACIFIC)
NORTHWEST, INC. and) COMMISSION ORDER
GTE NORTHWEST INCORPORATED) PARTIALLY GRANTING
) RECONSIDERATION
Pursuant to 47 U.S.C. Section 252.)
. . . . .)

I. INTRODUCTION

SUMMARY. In this order, the Commission concludes that it should not delete contract language obligating GTE Northwest Incorporated (GTE), to provide combinations of network elements at TELRIC This Commission uses a Total Element Long Run Incremental Cost (TELRIC) methodology in setting prices for network elements. prices for network elements.

PROCEDURAL HISTORY. The Commission issued its final order in this proceeding on August 25, 1997. In part of the order, the Commission declined to remove contract language obligating GTE to offer combinations of elements. The Commission rationale was that the issue relating to element combinations (Issue 31) addressed only the scope of AT&T Communications of the Pacific Northwest, Inc's., (AT&T) ability to combine elements rather than any obligation GTE might have to combine elements for AT&T.

GTE filed a request for Clarification or Reconsideration on
September 4, 1997. GTE asserted that it, in good faith, understood the Arbitrator's Report as requiring GTE to offer element combinations and, as a result of that understanding, GTE negotiated contract language to implement the Arbitrator's decision. GTE asks the Commission to treat the language as "arbitrated" language rather than "fully negotiated" language. In that context, the Commission would be requiring GTE to offer element combinations.

GTE then asserted that the requirement to offer element combinations violates the Eighth Circuit's July 18, 1997, decision. That decision struck some portions of the FCC'S Order No. 96-325 relating to element combinations. The Eighth Circuit, on reconsideration of its first decision, issued a second decision on October 14, 1997. The second decision struck additional portions of the FCC's order. After analyzing the second decision, the Commission called for additional briefs.

Both parties filed opening and reply briefs. GTE also filed an objection to the two exhibits AT&T attached to its reply brief. (The exhibits were copies of decisions from the Idaho and

Texas commissions.) When AT&T replied to the objection, it attached a decision from the Alabama commission. AT&T later submitted a January 28, 1998 decision from the Michigan commission. AT&T replied to GTE's objection on January 6, 1998.

STRUCTURE OF THIS ORDER. In this order the Commission first rules on the objection. It then decides whether it should treat contract provisions relating to element combinations as arbitrated language or fully negotiated language. It decides to treat the language as arbitrated, so the next section addresses the impact of the Eighth Circuit decisions on the Commission's ability to require GTE to offer combinations of elements. The Commission then considers the issue from a policy perspective and decides in favor of requiring GTE to offer element combinations.

II. GTE's OBJECTION

GTE asserts that it was unfair for AT&T to attach the decisions to its reply brief when it could have attached them to its opening brief and given GTE an opportunity to respond to them. It responds to the exhibits by asserting that factual differences make the decisions irrelevant as precedence for the Commission's decision in this case.

The "exhibits" are legal precedent rather than evidence, so they are not part of the evidentiary record and there is no basis for an evidentiary objection. There could be a fairness issue if any of the decisions were critical to this Commission's decision, but they are not. The Commission has GTE's comments on factual differences to help guide it in assessing the weight it should give to the other commissions' conclusions. (The same reasoning applies to the Michigan commission decision.) The Commission overrules the objection.

III. THE ARBITRATED/FULLY-NEGOTIATED ISSUE

In AT&T's reply to GTE's request for reconsideration, AT&T states that "[it] has never suggested that the Agreement's provisions regarding element combinations were negotiated...". There is no apparent dispute that GTE read the Arbitrator's Report as imposing an obligation to combine elements for AT&T. It would be unfair to GTE to treat the language as fully-negotiated language and it would be unfair to AT&T to strike the language as a mere proposal. The best solution is to treat it as arbitrated language and resolve the issue on its merits.

IV. THE EIGHTH CIRCUIT ISSUE

1. GTE's Argument. The Eighth Circuit's first decision vacated 47 C.F.R. 51.315(c). That subsection required incumbents to combine network elements for new entrants.

The Court, in its second decision, unambiguously ruled that an incumbent has no obligation to refrain from disassembling combinations of elements:

Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to combined) basis. Stated another way, §251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined

network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 252(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase a wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.

Iowa Utilities Board v. FCC, Order on Reconsideration, slip op. At 2 (Oct. 14, 1997) (emphasis added).

This Commission must follow the Eighth Circuit's ruling because it took effect on October 14, 1997, and the Supreme Court has not stayed it. The Eighth Circuit is the single circuit to review the FCC's Order No. 96-325. Its ruling applies nationwide.

2. AT&T's Argument. This Commission has independent state authority to:

_Prohibit GTE from separating existing element combinations unless AT&T requests separation, and

_Require GTE to enable AT&T to order combinations of elements in a single order unless AT&T requests otherwise.
The authority arises from:

_The general state policy in RCW 80.36.300(2) to "maintain and advance the efficiency and availability of telecommunications services" and RCW 80.36.300(3) to "promote diversity in the supply of telecommunications services and products" in the state.

_The specific authority in RCW 80.04.110 to determine "adequate" and "efficient" practices for telecommunications companies and also to "correct" practices that "tend to stifle" competition.

_The prohibition in RCW 80.36.170 against unreasonable prejudices and disadvantages.

The Commission should exercise its independent state authority because a failure to require GTE to offer combinations of elements would forestall competition in a way contrary to the public interest. GTE proposes to run jumpers from the main distribution frame (MDF) to the collocation space, and from the switch line card (port) to the collocation space. That would require the new entrant to cross-connect the jumpers to combine the loop with the port. The extra connections would escalate new entrant costs and create service problems.

This less efficient approach would violate the Act because:

_The Eighth Circuit ruled, in its July 18th order, that § 251(c)(3) does not require a new entrant to own or control any portion of a telecommunications network as a prerequisite to obtaining network elements.

_Section 251(c)(3) requires GTE to provide nondiscriminatory access at nondiscriminatory terms.

_47 C.F.R. § 51.311, which remains effective, requires incumbents to provide a quality of access to unbundled elements at least equal to the quality of access the incumbent provides to itself.

On the other hand, Commission action favoring AT&T would not violate the Act. Section 601(c) states that the Act does not "modify, impair, or supersede" state or local laws unless the Act specifically preempts the state or local law. Similarly § 251(d)(3) prevents the FCC from precluding state commission actions which (A) establish access and interconnection obligations, (B) are consistent with § 251; and (C) do not "substantially prevent" the FCC from implementing the Act. State commission action favoring AT&T would comply with § 261(c) because it is "necessary" to further competition and "consistent" with Congress' overall objective of a rapid transition to competitive local exchange markets.

Resolution. GTE correctly noted in its reply brief that the Eighth Circuit did not believe that it reached inconsistent results in its resolution of the "sham unbundling" issue in favor of new entrants and its resolution of the "element combinations" issue in favor of incumbents. See Iowa Utilities Bd. v. FCC, 120 F. 3d at 815. The court stated, with respect to sham unbundling, that the new entrant could obtain all of the elements for a telecommunications service from the incumbent. It then stated that, when a new entrant obtains elements from the incumbent, the Act does not require the incumbent to combine the elements into a service.

Under the Eighth Circuit's interpretation, the Act contemplates access to network elements under element pricing (e.g.TELRIC) when the new entrant, rather than the incumbent, combines the elements into services. Otherwise, the new entrant is obtaining a service for resale and the wholesale discount applies. The "carefully crafted" distinction between access to elements and resale of services ensures that incumbents receive compensation for doing the intellectual and physical work necessary to create services from elements.

Compensation is, of course, a pricing issue and state commissions, rather than the FCC, set retail rates for local services and resolve interconnection agreement disputes for element prices and wholesale discounts. 47 U.S.C. § 252(d). The Eighth Circuit's decision to vacate the FCC's combination rule makes sense because the FCC cannot ensure that the incumbent will receive compensation for the work necessary to create the combination. However, imposing that limitation on state commissions is not necessary to preserve the access/resale pricing distinction (compensation for the work necessary to combine elements) because a state commission can set element prices to ensure that the incumbent receives just compensation for creating any combinations the state may require the incumbent to offer.

As a practical matter, incumbents do not offer "sub-services" (like the local loop and port components of basic local service) for a new entrant to acquire and resell in lieu of purchasing the individual elements. It may be necessary for the state commission to require incumbents to combine some elements because it may not be technically or economically feasible for new entrants to perform that work. In those cases, the state commission would fail to achieve the primary goal of the Act (competitive local exchange markets) if it did not require the incumbent to offer the combination. It does not make sense to construe the Eighth Circuit's decision as prohibiting state commissions from achieving the overall goal of the Act when they have the ability to do so without thwarting the secondary goal of the access/resale pricing distinction.

State commissions, unlike the FCC, also have authority under the Act to implement state policies to the extent the policies are consistent with the Act. This commission has an obligation to implement Washington statutes governing quality of service and incumbent discrimination against new entrants. To the extent those statutes create a need for incumbents to offer element combinations, the Commission must require them to offer combinations to the extent the Commission is able to do so.

The following factors compel the Commission to resolve the pending issue in this proceeding by requiring GTE to combine elements from the Network Interface Device (NID), to the switch:

Feasibility. GTE's proposal to run jumpers may be "possible" to accomplish, but it is not desirable from a technological point of view because it requires extra connections (i.e. extra potential service failure points) and coordination between technicians from both companies (i.e. more potential service failure points). It also is not desirable from an economic point of view because it would increase costs for both companies. To the extent AT&T bears the extra cost, GTE's proposal would make it more difficult for AT&T to enter the market. To the extent either company passes the extra cost on to its customers, Washington's consumers will suffer.

Consistency with the Act. Rejecting GTE's proposal is consistent with the Act's access/resale distinction because the Commission can provide GTE with just compensation for the work it performs in combining the elements. Adopting GTE's approach would not be consistent with the overall goal of a rapid transition to competitive markets because it would hamper entry. The solution most consistent with the Act is to require GTE to provide the element combinations and set element prices to provide just compensation for the work GTE performs in combining the elements.

Washington's Discrimination Statute. In Washington, incumbent telephone companies are prohibited from treating themselves better than they treat new entrants. RCW 80.36.186 provides:

Notwithstanding any other provision of this chapter, no telecommunications company providing noncompetitive services shall, as to the pricing of or access to noncompetitive services, make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage. The commission shall have

primary jurisdiction to determine whether any rate, regulation, or practice of a telecommunications company violates this section.

"Service" is used in its broadest and most inclusive sense.
RCW 80.04.010. Network access through the purchase of network elements is a "service" under RCW 80.36.186.

The statute essentially splits incumbents into a hypothetical wholesale operation and a hypothetical retail operation. The wholesale operation may not discriminate against a new entrant either with respect to another new entrant or with respect to the incumbent's retail operation. This includes providing network elements to the retail operation under more favorable terms. If the incumbent's wholesale operation provides the incumbent's retail operation with direct port connections, and connects a new entrant only through jumpers, the incumbent has violated RCW 80.36.186.

This result is consistent with 47 C.F.R. 51.311(b), which requires incumbents to provide access "at least equal in quality" to the access they provide themselves. The access that GTE proposes to provide would not be equal in quality to the access it provides to itself because it would be through jumpers rather than direct connections. GTE's proposal would violate 47 C.F.R. 51.311(b).

Quality of Service. Section 252(e)(3) of the Act specifically authorizes state agencies to enforce state quality of service standards. This commission regulates the quality of service provided by telephone companies in accordance with RCW 80.36.300, which provides:

The legislature declares it is the policy of the state to:

(1) Preserve affordable universal telecommunications service;

(2) Maintain and advance the efficiency and availability of telecommunications service;

(3) Ensure that customers pay only reasonable charges for telecommunications service;

(4) Ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies;

(5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state; and

(6) Permit flexible regulation of competitive telecommunications companies and services.

It would be particularly difficult for the Commission to implement the policies set forth above under GTE's proposal:

Efficiency and Availability. GTE's proposal would make competitive telecommunications services less efficient because it requires the use of jumpers. It would make competitive services less available because logistical problems arising from the use of jumpers would put customers out of service for a period of time long enough to discourage customers from switching to AT&T's services. This would violate RCW 80.36.300(2).

Prices. By hampering competitive entry, GTE's proposal would reduce the pressure that competition puts on prices. It would tend to produce unnecessarily high prices for Washington consumers. This result would be inconsistent with RCW 80.36.300(3).

Diversity of Services. By hampering competitive entry, GTE's proposal would make it more difficult for the Commission to promote diversity in the supply of telecommunications products and services. This result would violate the policy set forth in RCW 80.36.300(5).

Regulatory Flexibility. To the extent GTE's proposal slowed the transition to competitive markets, it would slow the transition to more flexible regulation. This result would be inconsistent with RCW 80.36.300(6).

While it is impossible to determine at this point which specific state service quality standards GTE's proposal would violate, it is particularly likely to violate WAC 480-120-500(1). That rule obligates both companies to design, construct, maintain, and operate their facilities to ensure continuity of service, uniformity in the quality of service, and safety to people and property. The additional potential service failure points resulting from GTE's proposal would make the task of meeting the state's quality of service goals more difficult. GTE's proposal is not consistent with Washington's telecommunications policy goals and is hereby rejected.

V. CONCLUSIONS OF LAW

1. The Commission should overrule GTE's objection.

2. The Commission should grant GTE's request for reconsideration and treat contract language relating to element combinations as arbitrated language.

3. The Eighth Circuit's decisions do not prevent the Commission from requiring GTE to offer element combinations.

4. GTE's proposal is not consistent with the 1996 Act and is not consistent with Washington's telecommunications policy goals.

5. The Commission should reject GTE's proposal and decline to strike Section 32.5 of the contract or any other language obligating GTE to provide combinations of elements.

O R D E R

THE COMMISSION ORDERS that:

1. Section 32.5 of the contract, and the other language obligating GTE Northwest Incorporated to provide combinations of elements, shall remain in the contract.

2. In the event that the parties revise, modify, or amend the agreement, the revised, modified, or amended agreement shall be a new negotiated agreement under the Act and the parties shall submit it to the Commission for approval, pursuant to 47 U.S.C. § 252(e)(1) and relevant state law, before the agreement takes effect.

DATED at Olympia, Washington and effective this 16th day of March 1998.
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANNE LEVINSON, Chair

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 98-C-0690 - Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements.

PROPOSED FINDINGS

OF

ADMINISTRATIVE LAW JUDGE ELEANOR STEIN

CASE 98-C-0690

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 98-C-0690 - Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements.

APPEARANCES: See Appendix A.

ELEANOR STEIN, Administrative Law Judge:

BACKGROUND

The Telecommunications Act of 1996 (the Act) requires incumbent local exchange carriers to provide

> nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.[1]

In its October 14, 1997 decision, the United States Court of Appeals for the Eighth Circuit determined that, although this section could not be read by the Federal Communications Commission (FCC) to require incumbent local exchange carriers (LECs) to retain and supply existing combinations of elements, "the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them."[2]

The Bell Atlantic-New York Pre-filing

On April 6, 1998 Bell Atlantic-New York detailed additional commitments in connection with its application to provide in-region long distance service pursuant to the §271 of

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[1] 47 U.S.C. §251(c)(3).

[2] *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997).

the Act.[1] The Pre-filing contains numerous milestones Bell Atlantic-New York undertook to comply with the requirements for §271 entry, and describes significant steps to further open the New York market to competition. With respect to the combination of network elements, in the Pre-filing Bell Atlantic-New York pledged that competitive LECs

> will have the ability to recombine elements themselves through the use of smaller collocation cages, shared collocation cages, and through virtual collocation. In addition, Bell Atlantic-New York will demonstrate to the Public Service Commission that competing carriers will have reasonable and non-discriminatory access to unbundled elements in a manner that provides competing characters with the practical and legal ability to combine unbundled elements. Among the issues to be discussed in Bell Atlantic-New York's demonstration is the feasibility of 'non-cage collocation'. Bell Atlantic-New York will continue its current, ubiquitous offering of the platform until such methods for permitting competitive LECs to recombine elements are demonstrated to the Commission. This commitment, when met, will permit competing carriers to purchase from Bell Atlantic-New York and connect all of the pieces of the network necessary to provide local exchange service to their customers.

In order to define the method or methods by which competing carriers will combine elements, the Commission instituted this proceeding.

The Instituting Order

By order issued May 6, 1998, the Commission directed Bell Atlantic-New York to file with the Commission a proposal describing the method or methods by which competitors could combine network elements and to illustrate how those methods meet Bell Atlantic-New York obligations under the Act and the Pre-filing, providing an opportunity for parties to comment and

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[1] Case 97-C-0271, Pre-filing Statement of Bell Atlantic-New York, filed April 6, 1998 (the Pre-filing), p. 10.

propose alternative methods for combining elements.[1] A May 14, 1998 ruling established a schedule for this proceeding and required that all proposals for a method of combining elements be fully developed, with sufficient explanation to allow parties and Department of Public Service Staff (Staff) to test the proposals. Parties were instructed to include statements as to why the proposed option met the criteria in §§251, 252, and 271 of the Act; an explanation of how the method would operate; examples of other jurisdictions, companies, or industries where the method is working; an explanation of how the proposed method could be implemented in a commercially reasonable time period; documentation of the cost of the method; and an analysis of the impact of adoption of the method upon end-use customer service. Subsequently, the parties were requested to demonstrate how the proposed option was susceptible to making the transition to a facilities-based competitive market strategy. Finally, in the schedule was included a period for collaborative working sessions, prior to presentation of these recommendations to the Commission.

Parties' Filings

This inquiry opened with Bell Atlantic-New York filing offerings of its proposed options for provision of network elements in such a way as to allow carriers to combine them. Other parties then filed comments and alternatives, some with expansive legal and policy discussion, others with a more

[1] Case 98-C-0690, Combining Unbundled Elements, Order Initiating Proceeding (issued May 6, 1998).

technical bent.[1] From the filings, six distinct options were distilled, which were named and numbered to serve as the organizing principle for the mass of technical, financial, and policy data provided by the parties. From June 29, 1998 through July 1, 1998, an on-the-record technical conference was held, during which an advisory Staff team led a thorough examination of the offered proposals.[2] At the technical conference, parties presented six exhibits, and a transcript of 784 pages was compiled. Parties presented expert witnesses both to sponsor parties' own options, and to critique or support options sponsored by other parties. The six options are analyzed in some detail below. Following the technical conference, parties filed post-trial type memoranda.[3] Members of the advisory Staff team also met with vendors of various technologies and examined installations of offered options.

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[1] Parties filing comments, and in some cases proposing options, were: United States Department of Defense and all Federal Executive Agencies (DOD); Covad Communications Company (Covad); Metropolitan Telecommunications (Metropolitan); Cablevision Lightpath (Cablevision), NextLink New York, L.L.C. (Nextlink) and Association for Local Telecommunications Services (ALTS); AT&T Communications of New York, Inc. (AT&T); Time Warner Communications Holdings, Inc. (Time Warner); North American Telecom (North American); Hyperion Telecommunications, Inc. (Hyperion), LCI International Telecom Corp. (LCI); Sprint Communications Company, L.P. (Sprint); WorldCom Inc. (WorldCom); Telecommunications Resellers Association (TRA); USN Communications, Inc. (USN); MCI Telecommunications Corporation (MCI); Teleport Communications Group (TCG); Competitive Telecommunications Association (CompTel); Intermedia Communications, Inc. (Intermedia); RCN Telecom Services of New York, Inc. (RCN); and e.spire Communications, Inc. (e.spire).

[2] The advisory Staff team, coordinated by Andrew Klein and Margaret Rubino, included Scott Bohler, Christian Bonvin, Jonathan Crandell, Donna DeVito, Stacey Harwood, Jeffrey Hoagg, Kevin Higgins, Greg Pattenaude, and Steven Sokal.

[3] Filing post-technical conference briefs were Worldcom; Teleport; RCN and USN Communications; AT&T; Bell Atlantic-New York; CompTel; MCI; e.spire; Time Warner; COVAD, LCI; Intermedia; Cablevision; and Sprint.

On May 27, 1998, Bell Atlantic-New York filed its Methods for Competitive LEC Combinations of Unbundled Network Elements (Bell Atlantic filing). In its filing, Bell Atlantic-New York asserted that the Act requires it to do no more than provide competitive LECs collocation as a means to obtain access to unbundled network elements. It offered what it termed "a variety of ways" to combine unbundled network elements which, in its view, went far beyond the legal requirement. First, Bell Atlantic-New York asserts, it voluntarily offered competitors pre-assembled combinations of elements, including the switch sub-platform and the enhanced extended loop. Second, Bell Atlantic-New York offered both physical and virtual collocation to access and combine the complete range of unbundled network elements, asserting it has increased the availability and lowered the cost of physical collocation with smaller cages and shared cages. Third, it offered competitive LECs the ability to combine voice grade unbundled elements in assembly rooms, in assembly points outside the central office, and in common collocation space.[1]

On June 23, 1998, Bell Atlantic-New York filed a supplemental document including service descriptions for its assembly room and assembly point offerings, and detailing the common space physical collocation, renamed Secured Collocation Open Physical Environment (SCOPE). The supplemental filing also included representative rates with preliminary cost support, to establish the relative cost to competitive LECs of combining elements using the various options, prior to the Bell Atlantic-New York filing of tariff rates with cost support by July 23, 1998. This filing responded to the request of parties, and my

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[1] In light of the expedited schedule for this proceeding, preliminary information concerning costs was necessary to address the statutory requirement of just, reasonable, and non-discriminatory rates. However, Bell Atlantic-New York's concern that this not become a rate case is a valid one. The rates at issue here are or will be under scrutiny in the network element proceeding (Case 95-C-0657) and pursuant to Bell Atlantic-New York's July 23, 1998 tariff filing.